PP v. BOON FUI YAN

HIGH COURT SABAH & SARAWAK, MIRI
MAIRIN IDANG JC
[CRIMINAL CASE NO: MYY-42S-12-12-2014]
24 JUNE 2015

CRIMINAL LAW: *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Section 12 – Accused charged and convicted with trafficking in persons for purpose of exploitation by way of forced labour – Appeal against conviction and sentence – Prima facie case – Whether established – Whether accused involved in movement and conveyance of the trafficked persons into Malaysia – Whether there was need to prove coercion – Whether there was misapplication of s. 16 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Whether trial judge erred by misdirecting himself on ingredients of offence – Failure to take into account evidence showing victims willingly agreed to work for accused – Whether there was miscarriage of justice – Credibility of witnesses – Whether trial judge had accepted allegations of victims without first evaluating credibility of witnesses – Failure to call co-workers – Presumption under s. 114(g) of the Evidence Act 1950 – Whether invoked – Whether trial judge properly exercised maximum evaluation of prosecution's evidence – Whether trial judge failed to appreciate defence of accused – Whether accused created reasonable doubt in prosecution's case*

CRIMINAL PROCEDURE: *Appeal – Conviction and sentence, against – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 12 – Accused charged with trafficking in persons for purpose of exploitation by way of forced labour – Prima facie case – Whether established – Whether accused involved in movement and conveyance of the trafficked persons into Malaysia – Whether there was need to prove coercion – Whether there was misapplication of s. 16 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Whether trial judge erred by misdirecting himself on ingredients of offence – Failure to take into account evidence showing victims willingly agreed to work for accused – Whether there was miscarriage of justice – Credibility of witnesses – Whether trial judge had accepted allegations of victims without first evaluating credibility of witnesses – Failure to call co-workers – Presumption under s. 114(g) of Evidence Act 1950 – Whether invoked – Whether trial judge properly exercised maximum evaluation of prosecution's evidence – Whether trial judge failed to appreciate defence of accused – Whether accused created reasonable doubt in prosecution's case*

Boon Fui Yan ('the accused'), who was in the business of providing beauty care and massage services, had employed Indonesian nationals as masseurs in her business premises. Her Indonesian employees had been recruited through a registered agent in Miri. On 6 November 2013, the accused's business premise was raided by the police who had received a complaint from the Indonesian Consulate in Kuching. Subsequently, the accused was charged with four charges of trafficking in four persons ('the victims') for the purpose of exploitation by way of forced labour, an offence under s. 12 of

A the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'). At the close of the prosecution's case, the trial judge had ruled that the prosecution had established a *prima facie* case against the accused and called upon the accused to enter her defence. The accused person's defence was that she did not acquire or maintain the four victims whom she was B charged with trafficking and that she had not forced them to work as forced labourers. At the close of the defence case and after submissions were made by the prosecution and the accused, the trial judge convicted the accused on all the four charges under s. 12 of the Act. The accused was then sentenced to two years' imprisonment and a fine of RM2,000 in default of two months C for each of the four charges. Dissatisfied with her conviction and sentence, the accused filed the present appeal. At the same time, the prosecution also filed its appeal against the said sentence. The accused who considered herself wrongly convicted appealed, *inter alia*, on grounds that the trial judge had erred in law by failing to properly appreciate and apply all the essential ingredients of the offence under s. 12 of the Act and erred in law and in fact D by misdirecting himself on the ingredients of the offence under s. 12 of the Act. The accused further submitted that the trial judge had failed to consider that the real nature of the complaint from the Indonesian Consulate against her was the alleged poor working conditions at the appellant's place of employment and not the 'trafficking of persons by coercion for the purpose E of 'forced labour'. She also submitted that the finding of a *prima facie* case at the close of the prosecution's case was inadequate as it did not reflect a maximum evaluation of the prosecution's evidence before coming to such a finding.

F **Held (allowing appeal; acquitting and discharging accused of all charges):**

(1) It is trite that the duty of a trial judge at the close of the case for the prosecution was to undertake a maximum evaluation of the evidence adduced by the prosecution in coming to a decision as to whether the prosecution had made a *prima facie* case against the accused. Although G the trial judge had ruled that the prosecution had established a *prima facie* case against the accused, no reasonable person reading this ruling could come to a conclusion that the trial judge had carefully evaluated the evidence led by the prosecution. In evaluating the evidence, the trial judge was required to give his reasons as to why and how he concluded that a *prima facie* case had been proven, and such evaluation ought to be H fully on record in the notes of evidence contemporaneously. The accused was entitled to know the trial judge's reasoning in finding that a *prima facie* had been established before her defence was called, as this knowledge would assist her in preparing her defence. (paras 13,14, 16-20 & 34)

I **(2)** With the amendment to the Act in 2010, the term 'trafficking in persons' has been expanded to include the acts of trafficking beyond the specific acts of 'recruiting, transporting, transferring, harbouring, providing or

receiving'. The amendment had introduced the means by which trafficked persons were acquired or maintained, namely through 'coercion'. Therefore, in order to give purpose to the amended interpretation of 'trafficking in persons' to include the means used in trafficking, namely through coercion, s. 12 of the Act had to be read together with s. 16 to mean that only when it was proven that the accused had been trafficking the victims through or by means of coercion, would the consent of the person who was the victim of the trafficking become irrelevant. In the present case, the prosecution only relied on s. 12 of the Act to prove that the act of trafficking, which the accused was charged with, was the act of receiving all the four victims and then went on to submit that there was no need to prove coercion. In his grounds of judgment the trial judge misapplied s. 16 of the Act, when he found that the accused person had received the four persons from the recruiter and then held that their consent to enter the service of the accused was not relevant by virtue of s. 16 of the Act. This ruling was clearly wrong and amounted to a misdirection occasioning a failure of justice. The trial judge also fell into error when he ruled that the prosecution only needed to prove that the victims were trafficked persons and that they were exploited by the accused. The trial judge had misdirected himself by dispensing with proof of the second ingredient of the offence, namely that the accused had acquired or maintained the person by means of coercion. This occasioned a miscarriage of justice. (paras 23-26)

(3) The trial judge again fell into error by mistaking the poor working conditions, which could be fairly regarded as exploitative in the social and moral sense, to conclude that the four victims were used as 'forced labourers' as charged. With regard to the element of forced labour, the trial judge's reliance on s. 16 was clearly a misdirection because this section only applied to the act of trafficking and not to the purpose for which the acts of trafficking were carried out, *ie*, forced labour. This misdirection had occasioned a miscarriage of justice. Any suggestion that the workers had been forced to work for the accused could be rebutted if it could be shown that the trafficked person willingly agreed or consented to work for the accused. This exculpated the accused as the victims could not be regarded as 'forced labour'. The trial judge had failed to take into account evidence which showed that the victims had willingly agreed to work for the accused and were not forced into working for her. These facts should have been considered by the trial judge before he called for the defence. Further, the fact that there was no contract of employment between the accused and the victims had no bearing on whether the worker was used as 'forced labour'. (paras 27-30, 42, 43, 44, 50 & 68)

(4) The trial judge accepted the allegations of the four victims as consistent with one another without first evaluating the credibility of each of the witnesses or the probability of their allegations in a manner required of him and without dealing with the contradictions and inconsistencies amongst them. The trial judge accepted the testimony of the first victim (PW1) as to the harsh working and living conditions and mistreatments without testing her credibility against admitted documents and the conflicting evidence of the other prosecution witnesses. In the light of the contradictory and exculpatory evidence of the other victims, the trial judge ought to have regarded PW1 as an unreliable witness who grossly exaggerated the facts. However, the trial judge failed to explain why he still relied on the evidence of PW1 in calling for the accused to enter her defence. This occasioned a failure of justice. In the circumstances, the trial judge had not properly exercised a maximum evaluation of the prosecution's evidence before coming to his finding that a *prima facie* case had been made out. (paras 39-41, 74 & 78)

(5) In her defence, the accused had submitted that she did not acquire or maintain the victims through coercion and furthermore that she did not force them to work as forced labourers. Since the charges did not nominate whether her offence was by acquiring or maintaining the victims, she was entitled to lead evidence to exclude at least the charge of acquiring through conveying or transferring the trafficked persons. The fact that she was not involved in bringing the four victims into Malaysia had cleared her from any allegation that she had acquired them. This defence ought to have been considered by the trial judge. The ruling by the trial judge that evidence showing that the accused was not involved in any way in the movement and conveyance of the trafficked person into Malaysia as irrelevant, had in effect amounted to a misdirection. (paras 88 & 90)

(6) Based on the totality of all the evidence, it was clear that the trial judge had erred in ruling that the accused had failed to create any reasonable doubt in the prosecution's case. In fact, it was the prosecution that had failed to discharge their burden of proving the charges against the accused beyond reasonable doubt. (para 94)

(7) The trial judge had also erred in failing to apply the presumption under s. 114(g) of the Evidence Act 1950 against the prosecution for their failure to call the other co-workers whilst they were available or at the very least making them available and offering them to the defence. This error amounted to a failure of justice. (paras 96 & 97)

Case(s) referred to:

Benmax v. Austin Motor Co Ltd [1955] 1 All ER 326 ***(refd)***
Goh Ming Han v. PP [2015] 3 CLJ 17 CA ***(refd)***
Jee Chai Foo v. PP [2014] 1 LNS 694 CA ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Mohamed Din v. PP [1984] 1 LNS 171 HC ***(refd)***
Norata Singh v. Serdara Singh [1967] 1 LNS 115 FC ***(refd)***
Norisman Rozali v. PP [2014] 1 LNS 1202 CA ***(refd)***
Pengiran Johnathan Musa v. PP [2010] 10 CLJ 404 HC ***(refd)***
PP v. Hwong Yu Hee & Ors [2012] MLJU 1554 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Soo Ah Lai & Ors v. PP [2014] 4 CLJ 1056 HC ***(refd)***
Watt (or Thomas) v. Thomas [1947] 1 All ER 582 ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 12, 16, 17A
Evidence Act 1950, s. 114(g)

For the appellant - Stella Augustine Druce; DPP
For the respondent - Arthur CA Lee; M/s Arthur CA Lee & Partners Advocs

Reported by Vani Krishnan

JUDGMENT

Mairin Idang JC:

[1] For the purpose of this appeal I shall address the parties as the prosecution and accused. Now it is not disputed that the accused is the proprietor of Vin Beauty Care Centre at Lot. 845, Ground Floor, Jalan Merpati, 98000 Miri, Sarawak (the business premise). The accused is in the business of providing beauty care services, massage and selling beauty products to customers. The accused had then employed masseurs who were Indonesian nationals which she had recruited through a registered agent in Miri. On or about 6 November 2013, her business premise was raided by the police following a complaint from the Indonesian Consulate in Kuching.

[2] The accused was subsequently charged with four charges of trafficking four alleged victims under s. 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) at the Sessions Court. The charges read as follows:

> Pertuduhan Pertama
>
> That you, on 6.11.2013, at about 1725 hrs at Vin Beauty Care Centre, Lot. 845, Ground Floor, Jalan Merpati, 98000 Miri in the District of Miri, in the State of Sarawak, had trafficked in person to one, Hermawati (No Passport AS624226), aged 30 years old, for the purpose of exploitation by way of forced labour. Therefore you have committed an Offence under section 12 of the Anti Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007.
>
> Pertuduhan Kedua
>
> That you, on 6.11.2013, at about 1725 hrs at Vin Beauty Care Centre, Lot. 845, Ground Floor, Jalan Merpati, 98000 Miri in the District of Miri, in the State of Sarawak, had trafficked in person to one, Susi (No. Passport

A4821505), aged 40 years old, for the purpose of exploitation by way of forced labour. Therefore you have committed an Offence under section 12 of the Anti Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007.

Pertuduhan Ketiga

That you, on 6.11.2013, at about 1725 hrs at Vin Beauty Care Centre, Lot. 845, Ground Floor, Jalan Merpati, 98000 Miri in the District of Miri, in the State of Sarawak, had trafficked in person to one, Yati Sumiati (No. Passport A2441359), aged 40 years old, for the purpose of exploitation by way of forced labour. Therefore you have committed an Offence under section 12 of the Anti Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007.

Pertuduhan Keempat

That you, on 6.11.2013, at about 1725 hrs at Vin Beauty Care Centre, Lot. 845, Ground Floor, Jalan Merpati, 98000 Miri in the District of Miri, in the State of Sarawak, had trafficked in person to one, Murssini (No. Passport AS623226), aged 31 years old, for the purpose of exploitation by way of forced labour. Therefore you have committed an Offence under section 12 of the Anti Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007.

[3] After a full trial the accused was found guilty of all the four charges. The learned Sessions Court Judge (SCJ) convicted the accused and sentenced her to two years imprisonment from 26 November 2014 and a fine of RM2,000 in default of two months for each of the four charges which terms of imprisonment were to run consecutively.

[4] The accused is dissatisfied with the said conviction and sentences and had filed a notice of appeal on 3 December 2014. On 26 January 2015 after receiving the grounds of judgment (GOJ) the accused filed her petition of appeal which contained 20 grounds. The prosecution had also filed a notice of appeal against sentence on 1 December 2014.

[5] The relevant grounds of appeal are as follows:

5. That the learned Trial Judge erred in law when convicting the Appellant as he had failed to properly appreciate and failed to apply all the essential ingredients of the offence under section 12 of "ATIPSOM", as amended in 2010, namely:

(i) The Appellant participated in one of the various modes of trafficking of the alleged victims as set out under Section 2 of "ATIPSOM".

(ii) That the Appellant had coerced the alleged victims in the process of carrying out the one or more of the various modes of 'trafficking' as defined under section 2 of "ATIPSOM".

(iii) The victims were exploited in one or more of the various ways by the Appellant, which included 'forced labour', as set out under the definition of 'exploitation' in section 2 of "ATIPSOM".

(iv) That where the Appellant was specifically charge for using the alleged victims as forced labourers, evidence to show that the victims were compelled or coerced by the Appellant to work for her.

6. The learned Trial Judge erred in law and in fact by misdirecting himself on the ingredients of the offence under s. 12 of "ATIPSOM" and wrongly convicted the Appellant based on the following findings (at pp. 322 and 323 of the Record of Appeal), namely:

(i) "There was no proper written contract or even a proper oral contract with proper terms and that constitutes exploitation".

(ii) "The payments of salaries only at the end of the contract term, was made without the consent of the alleged victims constitutes exploitation".

(iii) "The alleged victims were forced to work 7 days a week ... and only given off days during Chinese New year and Hari Raya ... constitutes exploitation".

(iv) "The employees were not given medical treatment when one of them has fallen sick and this constitutes exploitation".

(The above four (4) findings are hereinafter referred to as the 'said 4 findings').

7. The learned Trial Judge failed to consider or properly consider that the real nature of the complaint from the Indonesian Consulate appears to be the alleged poor working conditions at the appellant's place of employment and not the "trafficking of persons by coercion for the purpose of 'forced labour'.

8. That the learned Trial Judge erred in law and in fact in arriving at the 'said four findings' by drawing wrong inferences from the facts of this case.

9. That the learned Trial Judge erred in law and in fact when on the evidence adduced in this case, he ruled (at p. 323 para. 30 of the Record of Appeal) that the evidence relating to the recruitment, conveyance and transfer of the alleged victims from Indonesia to Malaysia are irrelevant, and the fact that the Appellant played no role in the recruitment conveyance and transfer of the alleged victims was not a defence to the charges.

10. The learned Trial Judge failed to consider evidence exculpatory of the appellant. Your Appellant will elaborate and refer to this evidence at the hearing of this Appeal.

11. The learned Trial Judge erred in law and in fact in not making proper inferences in favour of the appellant on evidence where there could be two inferences from the same set of facts.

12. The learned Trial Judge erred in law in failing to scrutinise or properly scrutinise the objectivity and reliability evidence of PW7's, the investigating officer, evidence. He was also the recording officer of statements from witnesses.

13. The learned Trial Judge failed to objectively scrutinise and evaluate the standard and uniform answers given by all the four alleged victims during evidence in chief against their subsequent divergence/ contradiction and qualification during cross examination.

14. The learned Trial Judge erred in law in failing to invoke the presumption under s. 114(g) of the Evidence Act 1950 against the Prosecution at the close of the prosecution's case, for failing to call material witnesses who were available to them and who had been interviewed by the Police and from whom statements were recorded, namely:

(a) Madam Lau Hui kin (NRIC No. 660327-13-5948) who was an agent for all the Indonesian workers at the appellant's premises including the four alleged victims. She was available to provide crucial evidence at the trial.

(b) The 11 others co-workers of the alleged victims, in particular the two other co-workers at the appellant's premises who travelled together with PW4 from Indonesia to Miri. They were all available to testify on crucial evidence, at the time of the trial.

16. The learned Trial Judge erred in law and in fact in failing to consider or properly consider the Submissions of the Appellant at the close of the Prosecution's case. If the learned Trial Judge had properly considered the Submissions he would have acquitted your appellant.

17. That the learned Trial Judge erred in law and in fact by holding that the Prosecution had succeeded in proving a *prima facie* case against the Appellant at the close of the Prosecution's case.

18. The learned Trial Judge erred in law and in fact in finding that at the close of the Defence's case the Appellant had failed any reasonable doubt to the prosecution's case. In this finding the learned Trial Judge failed to consider or properly consider the evidence of your Appellant and DW2.

19. The learned Trial Judge erred in law and in fact when imposing a custodial sentence of two (2) years for each of the four (4) charges, he wrongly ordered that these custodial sentences run consecutively when he ought to have ordered for them to run concurrently.

20. The charges framed against the Appellant were defective in that it failed to specify which of the various ways the Appellant was alleged to have trafficked in the alleged victims as set out under the definition of "trafficking in-persons" under section 2 of the "ATIPSOM". This failure prejudiced the Appellant.

[6] On 2 March 2015 at the hearing of both appeals, Mr Raymond Szetu (Mr Szetu) and Mr Arthur Lee appeared for the accused. For the prosecution, ASP Mary Ong had stood in for DPP Stella Augustine Druce (DPP Stella). Both parties had tendered their written submissions. ASP Mary Ong had then informed me that DPP Stella might want to submit in reply. I then gave direction that DPP Stella was to file her reply on or before 25 March 2015 and reserve my ruling to 24 April 2015.

[7] On 24 April 2015 I had asked DPP Mr Mohd Syakil standing in for DPP Stella on whether she had filed the petition of appeal as it was not in the record of appeal. I then deferred my ruling to 27 May 2015.

[8] On 27 May 2015 learned DPP Mr Mohd Syakil informed me that DPP Stella could not confirm on whether the petition of appeal was filed or not and said: "In the light of the circumstances we humbly leave to this court's discretion and wisdom to decide on this matter." I then made my ruling: "I have read the record of appeal, all the submissions by both parties. I allow the appeal and order that the accused/appellant be acquitted and discharged, fine (if paid) and bail money are to be refunded. Appeal against sentence by DPP is struck out."

[9] Herein are my grounds.

[10] Now the charge against the accused was under s. 12 of ATIPSOM (hereinafter referred to as 'the Act'). Let me reproduce s. 12:

> Section 12: Any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine. (the Charge)

[11] Now s. 12 ATIPSOM must be read in conjunction with the interpretation of the words "exploitation" "coercion" and "trafficking in person", under s. 2 of the Act. Let me also reproduce s. 2:

> Section 2: In this Act, unless the context otherwise requires:
>
> "exploitation" means all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs;
>
> "coercion" means:
>
> (a) threat of serious harm to or physical restraint against any person;
>
> (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;
>
> (c) the abuse or threatened abuse of the legal process;
>
> "trafficking in persons" means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

[12] Before I deal with the evidence adduced by the prosecution in respect of the charge, it is trite law that the burden is on the prosecution throughout the trial to prove all the ingredients of the charges beyond reasonable doubt. However, at the close of the prosecution's case, the prosecution needs only prove a *prima facie* case which, if it remains unrebutted, would result in a conviction.

[13] It is also trite that the duty of a trial judge at the close of the case for the prosecution is to undertake a maximum evaluation of the evidence adduced by the prosecution in coming to a decision as to whether the prosecution had proven a *prima facie* case against the accused.

[14] The accused submitted that after the close of the prosecution's case, the learned SCJ had ruled: "Having heard all the prosecution witnesses' testimonies, and having considered all the submissions of both the learned DPP and learned defence counsel I hereby rule that the prosecution had established a *prima facie* case against the accused ..." This ruling is found in the contemporaneous notes of evidence at p. 282 of the record of appeal (vol. II). The accused, submission is that this finding of a *prima facie* is inadequate as it does not reflect a maximum evaluation of the prosecution's witnesses' evidence before coming to a finding of a *prima facie* case. Having read p. 282, I agree with the accused on this. No reasonable person reading the above ruling of the learned SCJ can come to a conclusion that he had carefully evaluated the evidence led by the prosecution.

[15] However, in his 30 page grounds of judgement (GOJ) dated the 26 January 2015, the learned SCJ made further comments of the prosecution's evidence at the close of the prosecution's case to justify his finding of a *prima facie* case and the calling of the defence on 3 October 2014. The question that may be asked is whether I should rely on the judge's finding of a *prima facie* case during the course of the trial as recorded in the notes of evidence on 3 October 2014, or should I rely on the GOJ.

[16] I am conscious of the law that the prosecution needs not show at the end of the prosecution's case that they had proven their case beyond reasonable doubt. However, it is different principle altogether when it comes to requiring a trial judge to state before the calling of the defence, his reasons as to why and how he concluded that a *prima facie* case had been proven. I am personally inclined to the view that the accused is entitled to know the learned judge's reasoning in finding that a *prima facie* case had been established before her defence is called. This knowledge would assist her in preparing her defence to discharge the burden placed on her. I refer to *Norisman Rozali v. PP* [2014] 1 LNS 1202; [2015] 3 MLJ 125 (CA) at para. 28:

> ... The appellant has been prejudiced in being deprived of the trial Judge's reasons in finding a *prima facie* case had been established against him. He was denied of his basic right of knowing the facts against him in order to prepare his course of defence and to discharge the burden on him. The failure ... may have caused the appellant to have lost a chance which was fairly open to him to raise a proper defence ... This is a miscarriage of Justice.

[17] Furthermore, since an evaluation finding of a *prima facie* case had to be made during the course of trial, such evaluation ought to be fully on record in the notes of evidence contemporaneously. Otherwise no one could know for certain whether it was a contemporaneous evaluation or an afterthought. This is an issue of fairness.

[18] In *Mohamed Din v. Public Prosecutor* [1984] 1 LNS 171; [1985] 2 MLJ 251 (HC), at p. 256 para. G, Gunn Chin Tuan J (as he then was) accepted the proposition that, "justice" comprehends not merely a just decision but also a fair trial.

[19] Notwithstanding my above view, I do find myself bound by the decision of the Supreme Court in *Junaidi Abdullah v. Public Prosecutor* [1993] 4 CLJ 201 at p. 206 (CLJ); [1993] 3 MLJ 217 (SC), at p. 218 para. 2 which says that nothing in the law which requires a judge sitting alone to expressly record his reason before calling the defence.

[20] I am also reminded by the above Supreme Court case of *Junaidi Abdullah*, *supra*, at p. 218 para. (3), that even if the appellant had conceded at the trial that there was a case to answer, which is not the case in this instant appeal, it was still open and indeed incumbent upon the court at the appellate stage to examine the appeal record so as to be satisfied that there was in fact and in law a case for the appellant to answer.

[21] I will now proceed to see if the learned SCJ had exercised a maximum evaluation of the prosecution's witnesses in accordance with established principles. However before I deal with the evaluation by the learned SCJ on the reliability of the prosecution's witnesses' evidence at the close of the prosecution's case, this court will have to see whether the learned SCJ had correctly applied the law in regards to the ingredients which the prosecution had to prove to establish a *prima facie* case. Consequently whether in law there was a case of which the accused had to answer.

[22] Now what are the ingredients of s. 12 of the Act? Let me explain.

First ingredient - acts of trafficking. The first ingredient includes of 'receiving' of the four persons.

Second ingredient - acted by **means** of "coercion". In respect to the second ingredient of using the means of coercion, I noted that prior to the amendment of the Act in 2010 the interpretation under s. 2 of the original Act of 2007, dealt only with the acts of trafficking for the purpose of exploitation dealing with the means deployed. The term "trafficking in persons" or "traffics in persons" meant certain specified acts like the recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of "exploitation".

A However, Parliament in 2010 (after accession to the UN Protocol to prevent, suppress and punish Traffickers in Persons, in 2009) amended the interpretation provision of the Act. The term "trafficking in persons" is now expanded to include the acts of trafficking beyond the specific acts of "recruiting, transporting, transferring, harbouring, B providing or receiving". These specific acts now are merely non-exclusive instances of "acquiring or maintaining". The amendment had introduced the means by which the trafficked persons were acquired or maintained namely **'through coercion'** (see interpretation of coercion).

C Now does s. 16 of the Act relieves the prosecution from proving the means taken by the accused to receive the four persons, namely through coercion. Section 16 says "In a prosecution for an offence under ss. 12, 13 or 14, it shall not be a defence that the trafficked person consented to the act of trafficking in person." I think we cannot dispense with proof D of the means of trafficking through coercion. Parliament had decided to amend s. 2 of the Act in 2010 to include coercion, conscious of the existence of s. 16 at the time of the amendment. This gives rise to the presumption that Parliament does not make an error in introducing the new element of coercion as a means of trafficking. It must be presumed E that the amendment was deliberate.

Therefore, in order to give purpose to the amended interpretation of 'trafficking in person' to include the means used in trafficking namely, through coercion, s. 12 of the Act, read together with s. 16, means that only when it is proven that the accused had trafficked the victims F **through or by means of coercion**, that the consent of the person trafficked is irrelevant.

The third ingredient - **purpose** of trafficking - exploitation. The term 'exploitation' is limited to certain acts under the interpretation s. 2 of the Act. On "forced labour" the same is not defined under s. 2 of the G Act but in its ordinary meaning, it must mean some form of force or compulsion on the worker to continue working. Under this ingredient, there must be evidence to show that the worker was forced to remain or prevented by some form of coercion. So when a worker says that, "I am forced to work or I have no choice but to carry on working because H I needed the money to support my family or that there is no other work available", these personal circumstances of the worker cannot amount to "forced labour".

So too where a worker admits that she consents to work for an employer and that she was not forced or coerced into so working, her service I cannot be said to be "forced labour". (emphasis added).

[23] In the prosecution's submission dated 2 March 2015 at p. 14, the act of trafficking which the accused is accused of was the act of "receiving" all the four persons. The prosecution relied on s. 12 of the Act to say that under

"trafficking in persons", the prosecution needs not prove coercion. The learned SCJ at p. 21 of the GOJ found that the accused received the four persons from Madam Lau and went on to say in the same page that their consent to enter the service of the accused was not relevant by virtue of s. 16 of the Act. I have already stated why I find that the learned SCJ's ruling is wrong in his application of s. 16 in my elaboration of the second ingredient of s. 12 in para. 22 above. This was a misdirection occasioning a failure of justice.

[24] It is pertinent at this stage also to refer to an earlier judgment of the learned SCJ in the case of *Public Prosecutor v. Hwong Yu Hee & Ors* [2012] MLJU 1554 where he correctly interpreted s. 12 of the Act. At paras. 65 to 67 of *PP v. Hwong Yu Hee*, the learned SCJ found that no *prima facie* case under s. 12 of the Act was made out where the Indonesian women had willingly worked as prostitutes and were not forced to do so. At para. 75 of that case, the learned SCJ again correctly found that an essential ingredient of trafficking was to show that the five victims were coerced ie, held against their own free will or being forced into prostitution.

[25] I feel that if the learned SCJ's application of s. 16 to an offence under s. 12 in this instant appeal is correct, then all brothel owners in Malaysia will be guilty under the Act irrespective of whether the prostitute came to the brothel and work there voluntarily or otherwise. This cannot be the mischief which Parliament intended to remedy under the Act as there are other existing laws like the Penal Code which deal with this type of offences.

[26] The learned SCJ fells into further error when he ruled that all the prosecution need to prove is that the victims were trafficked persons and that they were "exploited" by the accused. However in so doing, he had misdirected himself by dispensing with proof of the second ingredient of the offence, namely that the accused had acquired or maintained the person by means of coercion. This in my view has occasioned to a miscarriage of justice.

[27] At p. 21 of the GOJ, the learned SCJ again fells into error when he found that the fact of long hours of work, the unilateral retention and deferment of salaries, the very limited off days and cramped accommodations constituted "exploitation" within the meaning of the Act. I find that all these facts of poor working conditions, may fairly be regarded as exploitative in the social sense but are clearly not sufficient to conclude that the four persons were used as "forced labourers" as charged.

[28] In its ordinary meaning, under the third ingredient of the offence, a person's service cannot be regarded as a "forced labour" if she was not coerced into it or if she consented to continue working for the accused.

[29] With regard to the element of forced labour (ie, the third ingredient of the offence), the learned SCJ's reliance on s. 16 of the Act in ruling that the consent of the worker is irrelevant, is clearly a misdirection because

A s. 16 of the Act applies only to the first ingredient of the offence ie, 'the acts of trafficking' and not to **purpose** for which the acts of trafficking were carried out, namely, 'forced labour'. This misdirection had occasioned a miscarriage of justice. (emphasis added).

B **[30]** In the present appeal, the learned SCJ had used the term "exploitation" in a social and moral sense, to describe what he personally believed to be unacceptable and harsh working conditions and mistreatment which the victims had to endure.

[31] I take note of the prosecution's submission at p. 22 at para. 6, that the C accused had breached the memorandum of understanding on the Recruitment and Placement of Indonesian Workers and the Decent Work for Domestic Workers (Convention 189 by the International Labour Office Geneva). However, nothing more was submitted by the learned DPP on this memorandum of understanding, its terms and obligations and the contracting parties. I am not convinced that the breach of this memorandum of D understanding has any relevance to the offence charged under s. 12 of the Act.

[32] Whilst the mistreatment of workers is never to be condoned, such mistreatment is not the mischief which the Act is enacted to remedy. I wish to echo the words of Amelia Tee Abdullah J in *Soo Ah Lai & Ors v. PP* [2014] E 4 CLJ 1056 at p. 1057 at para. 3: "The court does not condone or positively abhors any form of ill treatment of domestic help. However, the fact that a domestic maid had been ill treated and abused does not *ipso facto* mean that recourse should be had to the provisions of ATIPSOM ..."

F **[33]** I find that any one of the above errors into which the learned SCJ fell on the requirements of a charge under s. 12 of the Act, amounted to misdirection and had occasioned a miscarriage of justice. It therefore warrants the acquittal of the accused. Grounds 5 and 6 of the petition of appeal are therefore allowed.

G **[34]** Now at the close of the prosecution's case, the learned SCJ was required to test the evidence of all the prosecution's witnesses from all angles and to test their reliability and credibility. They must be tested against the probabilities of the case. Their evidence must not be accepted at face value but must be tested and evaluated to ascertain whether it suffers from any H infirmities, gaps and contradictions. This is what we call "maximum evaluation".

[35] To illustrate what is required of the trial judge in undertaking a maximum evaluation of the prosecution's evidence at the close of the prosecution's case, the following authorities are very relevant.

I *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC) at p. 465 at para. 12;

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 (CA);

Jee Chai Foo v. PP [2014] 1 LNS 694; [2015] 2 MLJ 695 (CA) at para. 13; A

Pengiran Johnathan Musa v. PP [2010] 10 CLJ 404 (HC);

Goh Ming Han v. PP [2015] 3 CLJ 17; [2015] 3 MLJ 781 (CA)

[36] Now where there are two versions in the prosecution's case which are contradictory, the learned SCJ cannot accept both and must decide which B one is true. The judge must arrive at his decision by assessing, weighing and for good reasons either accepting or rejecting the whole or part of the evidence placed before him. This means the judge must give reasons for believing or not believing a witness. Where a prosecution witness is found to have lied on oath, the judge must give reasons why the witness can still C be a witness of truth for other matters stated in its evidence. The judge must draw the proper inferences from admitted or proven facts. If the prosecution's evidence admits two or more inferences, the inference favourable to the accused must be drawn. The judge must crucially take into account evidence adduced by the prosecution which is exculpatory of the D accused.

[37] From my reading of the learned SCJ's GOJ, from p. 1 up to p. 21 where he concluded that a *prima facie* case had been made out, a substantial portion of these pages merely recounted what the four witnesses had testified. The learned SCJ accepted the allegations of PW1 to PW4 inclusive as E consistent with one another without first evaluating the credibility of each of the witnesses or the probability of their allegations in a manner required of him and without dealing with the contradictions and inconsistencies amongst them. From these evidences of the four witnesses, he drew inferences and conclusions, which I will deal with shortly. F

[38] The learned SCJ's treatment of the evidence in this appeal closely mirrored the conduct of the Sessions Court Judge in *Pengiran Johnathan Musa v. PP* [2010] 10 CLJ 404 (HC), which was found wanting by the judge on appeal, at p. 409 para. 20: "These inconsistencies in the evidence of PW5 ... was never considered by the learned Sessions Court Judge. She merely G narrated her evidence ... but did not pick out the inconsistencies and consequently did not give any reasons why she preferred the evidence of PW1 - PW4 over that of PW5. In fact at one stage ... she even grouped PW5's evidence together with that of PW1 to PW4 and made a sweeping statement to say that "From the evidence adduced by the prosecution's H witnesses, PW1, PW2, PW3, PW4 and PW5, it is clear that the accused assisted in the management of the said premises for prostitutions."

[39] In this appeal, all the allegations of harsh working and living conditions and mistreatments which the learned SCJ accepted, were led by the testimony of PW1. In accepting her evidence without more, the learned I SCJ had failed to test her credibility against admitted documents and the conflicting evidence of the other prosecution's witnesses.

[40] For examples:

(a) PW1 alleged that she had to work from 8am to 8pm without rest and when she returned home, she had to perform household chores until midnight without rest.

Upon a critical evaluation of the prosecution's evidence, the learned SCJ ought to have regarded PW1 as an unreliable witness:

(i) From analysing the work record sheets of the Vin Beauty Care Centre in exhs. P28 and P29 which accused's counsel had provided in his submission, a fair conclusion and a proper inference is that although each working shift was long, ie, from 10 to 12 hours' shift, the actual time spent was in fact an average of about five hours per day and 35 hours per week. In this light, this evidence of the 12 hours' shift is not as harsh as was made out by PW1.

(ii) When there were no customers, workers were allowed to rest, sit around and tidy up but not sleeping (see evidence of PW2 at p. 76 of the record of appeal (vol. I) and of PW3 at p. 125 of the record of appeal (vol. I)). PW2 and PW3's evidence should be weighed against PW1's evidence. Instead, the learned SCJ took a broad brush approach and concluded that PW3's story on the working and living conditions are the same as PW1 and PW2, and stated at p. 19 of the GOJ that, "it would be quite superfluous for me to repeat those here again".

(iii) As to PW1's allegation of having to work until midnight on household chores after returning from work at the beauty centre, a critical analysis of PW2's evidence at pp. 82 and 83 of the record of appeal (vol. I) showed that PW1 had exaggerated the burden on her. In fact, all the workers living with the accused took their turn to cook and to clean up their living quarters and that a schedule was provided.

(b) PW1 says that she was only provided with one meal a day.

(i) This again was a gross exaggeration which the learned SCJ duly accepted on its face value. A critical evaluation of the evidence of all the prosecution's witnesses again would show that PW1 had lied under oath on this count. PW1 distorted the fact that the accused provided her and her colleagues with a free meal per day whilst working at the business premises, into an allegation that she and her colleagues were starved because only one meal was available to the workers the whole day.

(ii) PW2 testified that the accused provided one meal during working hours but breakfast and dinner were cooked at the living quarters at p. 102 of the record of appeal (vol. I). This was corroborated by

PW3 who testified that one meal was provided when they were working at the shop, breakfast and dinner were prepared by the workers, sometimes the accused provided these meals at home (at p. 143 of the record of appeal (vol. I). PW4 again confirmed that the accused provided one meal during work and if it was inadequate they had to buy addition food by themselves (at p. 167 of the record of appeal (vol. I)) and breakfast and dinner were prepared by the workers (at p. 190 of the record of appeal (vol. I)).

(iii) Despite the evidence of the three other prosecution's witnesses to the contrary, PW1 under cross examination held on to her lies that only one meal was available to her each day (at p. 63 of the record of appeal (vol. I)).

(c) PW1 says that she had no access to a telephone.

(i) At the close of the prosecution's case, the learned SCJ further accepted PW1's allegation that she had no access to a telephone and could not call her family, implying that she could not seek rescue or help. In so doing, the learned SCJ again failed to evaluate PW1's evidence against the other prosecution's witnesses' evidence rebutting or contradicting her claim.

(ii) PW2 agreed with the accused's counsel under cross-examination that the accused provided a mobile phone No. 013 8035000 for her and colleagues to call home and she did try to call home (at pp. 111 and 112 of the record of appeal (vol. I)).

(iii) PW3 further testified that she was allowed to contact families back home (at p. 130 of the record of appeal (vol. I)).

(iv) The learned SCJ's finding of fact that no access to a telephone was provided to the PW1 to call home is plainly wrong. The failure of the learned SCJ to consider the contradictory and exculpatory evidence of PW2 and PW3 had occasioned a failure of justice.

[41] In the light of the plain lies of PW1, the learned SCJ failed to explain why he still relied on the evidence of PW1 in calling for the defence. On this point, I refer to *Pengiran Johnathan Musa v. PP* [2010] 10 CLJ 404 (HC) at p. 410 at para. 23 and at p. 411 at para. 24.

[42] Now the learned SCJ had also failed to consider exculpatory evidence. I find that in a charge for trafficking in persons for the purpose of "forced labour" under s. 12, it is essential that the prosecution shows that the person was forced into working for the accused. Any suggestion the workers being forced to work for the accused can be rebutted where it is shown that the trafficked person willingly agrees or consents to work for the accused. This exculpates the accused as the persons cannot be regarded as "forced labour".

A However if it is shown that the appellant had acquired or maintained her workers by coercion, then and only then the consent of these works are irrelevant.

[43] The learned SCJ had failed to take into account evidence which showed that the four persons had willingly agreed to or was not forced into
B working for the accused. For example:

(a) Option to change jobs.

The four persons were provided to the accused by a registered agent for Indonesian workers, a Madam Lau. Madam Lau would place new
C arrivals with employers who had applied to be her workers. Although the new arrivals had no say on where they should be initially placed, they had the option of asking their agent to find them an alternative work if they found the work assigned to them unsuitable or not to their liking. They were not forced into remaining with any employer if they wanted
D to be reassigned.

(b) This option to change jobs was exercised by three out of the four persons.

(i) PW1 worked for a place which made cakes and after two months she asked her agent to find her a new employment and she was sent
E to the accused (at pp. 23 and 24 of the record of appeal (vol. I)).

(ii) PW2 was first sent to work in a restaurant but after a week, she asked Madam Lau to assign her to a new job because the restaurant served pork. She was then assigned to the accused (at p. 44 of the
F record of appeal (vol. I)). PW2 reiterated in her re-examination that the accused did not force her to work (at pp. 112 and 113 of the record of appeal (vol. I)).

(iii) PW4 testified that in her first placement as a house maid she was required to bath a dog. She asked Madam Lau to find her another
G job and she was sent to work for the accused (at p. 163 of the record of appeal (vol. I)). After working for the accused for some time, she testified that she wanted to change and informed her agent to find her a new job. The agent did not respond but her lack of response has nothing to do with the accused (at p. 186 of the record of appeal
H (vol. I)).

[44] The fact that all the three workers had an option of leaving a job which they did not like militates against any suggestion that they were kept or maintained by anyone as forced labourers under the third of the offence. This should have been considered by the learned SCJ before he called for the
I defence.

[45] None of the four persons testified that they were prevented from leaving the employment of the accused when they attempted to leave by some form of threat or restrain. The fact that no attempt was made to escape was considered as a relevant fact in the *Hwong Yu Kee*'s case, *supra*.

[46] I note that it was only in regards to the allegations that the accused had prohibited the four persons from observing their religious obligations like fasting, prayers etc., that the learned SCJ rejected their evidence on the ground that these allegations were uncorroborated by other independent evidence and the accused denial. If the learned SCJ had properly evaluated the evidence of PW1 to PW4 in this regard the evidence of the four persons had been rejected because these allegations are mere hearsays. None of the witnesses were prepared to swear that the accused had personally prohibited them from carrying their religious obligations. It was always "She did not prohibit us. I heard it from the others."

[47] I find that if the learned SCJ had uniformly applied the same requirement of the need to corroborate the testimonies of PW1 to PW4 by other independent evidence, then in respect of all other allegations against the accused, he ought to have rejected them for the same infirmity.

[48] Now an appellate court always had the right to see whether the trial judge drew the correct inference and came to the right conclusion on proven or admitted facts. I refer to *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC) at p. 475 at para. 34: "Of course, we may examine the record to see if the trial court drew the proper inferences from proved or admitted facts …"

[49] I also refer to *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326 (HL) at p. 326 at para. B:

> Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own opinion, though it will give weight to the opinion of the trial judge.

[50] The learned SCJ at p. 13 of the GOJ wrongly inferred that the absence of any written or oral contract of employment amounted to exploitation of PW1 to PW4 (also at pp. 322 and 323 of the record of appeal (vol. III)), and further held that this absence had important implications in the finding on the issue of exploitation (at p. 13 of the GOJ). The learned SCJ clearly took into consideration matters which he ought not to consider. To equate the absence of a contract of employment to exploitation by means of "forced labour" is clearly wrong. I find that the existence or absence of a contract of employment between an employer and a worker has no bearing on whether the worker was in fact used as "forced labour" and was forced to continue working for the appellant.

[51] The learned SCJ further came to the wrong conclusion at p. 15, lines 10 to 13 of the GOJ that PW1 did not escape because her passport was kept by the accused. The learned SCJ concluded that the retention of her passport amounted to exploitation. This conclusion begs the questions, did PW1 attempt to escape from her employment and did the accused prevent PW1 from escaping?

[52] Now I do not know of any law and neither the learned DPP nor counsel for the accused had informed the court that there is any law to prohibit the retention of another's passport. Further, I find that this conclusion of exploitation is not sound as the retention of the passport would have no real effect on any worker determined to escape from the accused employment to seek rescue from the authorities. There was no evidence that PW1 had wanted to leave Vin Beauty Care Centre, let alone escape or had requested for the return of her passport and that the accused had refused to return it. If PW1 wanted to leave the accused's service, she could easily have informed her agent Madam Lau as she and others had previously done (at p. 23 of the record of appeal (vol. I)). There was no need to "run away", so to speak. Consequently, there was no valid reason to accept PW1's claim that she was afraid to escape because the accused retained her passport. As a matter of fact, PW2 came into Malaysia using another person's passport and it was the accused who had assisted her to get a proper one. This showed the absence of one's passport does not stop a person from moving in or out of the country but illegally. The retention of passport *per se* is not a coercion or compulsion/force within the meaning of "forced labour" envisaged under the Act.

[53] Another inference which could equally be drawn from the retention of PW1's passport was that the accused had incurred expenses of RM6,000 and RM1,200 being agent and quota fees for each of her workers (at p. 293 of the record of appeal (vol. II)). By retaining her passport, PW1 would be discouraged from leaving her employment without notice. Notice from PW1 would enable the accused to seek contribution for the agent and quota fee incurred by her on PW1's behalf from her or her prospective new employer.

[54] I note that PW1 had voluntarily travelled to Miri to seek employment through the agency of Madam Lau. In Miri, she was allowed to change her job when she was unhappy with the one initially assigned to her. In this context, when PW1 was asked under cross-examination why Madam Lau retained her passport, she said that, "I think she doesn't want me to run away" (at p. 58 of the record of appeal (vol. I)). Again when asked why the accused took her passport, she answered, "I think it's because she is afraid that I would run away" (at p. 62 of the record of appeal (vol. I)). In the context of background facts, the term "run away" used by PW1 should be interpreted in the context of leaving an employment or returning home without notice, rather than escaping from any alleged forced labour. The learned SCJ ought to have drawn the inference most favourable to the accused, but failed to do so.

[55] The learned SCJ further drew the wrong inference from the long working hours and the absence of off days for PW1 to PW4 as evidence of exploitation (at p. 21 of the GOJ). Although the conditions of work may be oppressive or exploitative in the social and economic sense, this is not the same as saying that the workers were forced to continue working for the accused and were prevented from leaving her employment, ie, by threat of serious injuries or restraint.

[56] I note in passing that in the notes of evidence, the prosecution's witnesses were asked in respect of matters when the workers were "rescued". From the evidence, I find that there was no attempt by anyone to escape. Reference to the "rescue" was in fact a reference to the surprise raid conducted by the police arising out of a complaint from the Indonesian Consulate.

[57] The condition and atmosphere under which the accused's workers, including PW1 to PW4, worked was best captured by the testimony of PW6, the officer who conducted the surprise raid on the beauty care centre on 6 November 2012 at around 5.25pm. Upon entering the premises, PW6 observed an air of normality and a lack of restraint of any sort. At p. 213 of the record of appeal (vol. II), PW6 testified as follows:

> ... During the inspection I found a few Indonesian workers were doing their work at their respective rooms... Some were doing massage, some were doing facial and some were having their drinks and food.

[58] Therefore on the matters stated above, I rule that the learned SCJ had not properly exercised a maximum evaluation of the prosecution's evidence before coming to his finding that a *prima facie* case had been made out. Grounds 8, 10, 11, 13, 16 and 17 of the petition of appeal are therefore allowed.

[59] In respect of ground 7 of the petition of appeal that:

> The learned trial judge failed to consider or properly consider that the real nature of the complaint from the Indonesian Consulate appears to be the alleged poor working conditions at the appellant's place of employment and not the trafficking of persons by coercion for the purpose of forced labour.

I reject this ground. The learned SCJ had to deal only with the charge as laid and need not consider the nature of the complaint lodged by the Indonesian Consulate.

[60] As regards ground 12 of the petition of appeal that:

> The learned trial judge erred in law in failing to scrutinise or properly scrutinise the objectivity and reliability of PW7, the investigating officer's, evidence. He was also the recording officer of statements from witnesses.

I again reject this ground of appeal. I find that the evidence of PW7 was neutral, the statements of the witnesses recorded by him were not used at the trial and that the allegations and implications against the accused were made by PW1 to PW4. The learned SCJ did not rely or refer to the evidence of PW7 in finding against the accused.

[61] Now at the close of the defence's case, and after submissions were made by the prosecution and learned counsel for the accused, the learned SCJ convicted the accused on all the four charges under s. 12 of the Act.

[62] Ground 6 of her petition of appeal the accused stated that the learned SCJ in convicting her had misdirected himself on the ingredients of the offence, which misdirection is evidenced at pp. 322 and 323 of the record of appeal (vol. III). Further, under ground 18 of the petition of appeal, the accused complained that the learned SCJ erred in finding that she had failed to establish any reasonable doubt on the prosecution's case.

[63] Now ground 6 of the petition of appeal deals with the four findings recorded in the GOJ but in view of ground 18 of the petition of appeal, I will look into all the findings of the learned SCJ on the evidence after the defence was called which are stated in the GOJ from pp. 22 to 28 inclusive.

[64] At pp. 25 to 28 inclusive of the GOJ, the learned SCJ repeated all his earlier findings as recorded in his judgment and made four additional in the GOJ. To avoid repetition I shall only deal with all the eight findings stated in the GOJ.

[65] When the learned SCJ concluded that the facts found in the above eight findings amounted to instances of exploitation, he seemed to have departed from the interpretation of the word under ss. 2 and 12 of the Act and under the charge, namely, the complainants were coerced to work as forced labourer. Such findings of the learned SCJ relate only to harsh living and working conditions. There was no finding that the victims were acquired or maintained through coercion and were being used by the accused as "forced labourers". With respect here the learned SCJ had misdirected himself. I therefore find that all the eight findings in the learned SCJ's GOJ are irrelevant in supporting the charges against the accused. The learned SCJ had misdirected himself in finding that there was exploitation within the meaning of the Act. This error amounted to a miscarriage of justice which warrants the acquittal of the accused.

[66] Ground 8 of the accused's petition of appeal says that the learned SCJ even got it wrong in fact and in law in coming to his conclusion that the accused had failed to rebut the prosecution's case based on the eight findings.

[67] Before I proceed, I reminded myself of the situations under which an appellate court is permitted to review the findings of fact of the trial judge and come to its own finding. In *Watt (or Thomas) v. Thomas* [1947] 1 All ER

582 (HL) where Lord Thankerton in the House of Lords set out three propositions when an appellate court may or may not replace the trial judge's finding of fact with its own. At p. 587 at para. A to B:

> I. Where ... there is no question of misdirection ... by the judge, an appellate court which is disposed to come to a different conclusion ... should not do so unless it is satisfied that any advantage enjoyed by the trial judge ... could not be sufficient to explain or justify the trial judge's conclusion. II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Watt (or Thomas) v. Thomas was adopted by the Federal Court at Singapore in *Norata Singh v. Serdara Singh* [1967] 1 LNS 115; [1967] 1 MLJ 265 (FC) at p. 266 at para. B.

[68] I will rely on Lord Thankerton's above propositions I and III and the right of an appellate court to see whether the learned trial judge had come to a correct conclusion or inference based on proven facts.

[69] Finding (1) at pp. 25 and 26 of the GOJ. The learned SCJ said:

> There was never any contract of employment between the accused and the four persons ... Not only there was no written contract but there was not even a proper oral contract with proper terms and consensus between the four persons and the accused ... Now the reason why the court emphasise that a proper contract is necessary is to prevent exploitation of anyone especially the exploitation of employees by their employers.

[70] The learned SCJ clearly misdirected himself when he held that a contract of employment was required as a means of preventing exploitation. Section 12 of the Act does not deal with the provision of safeguards for workers but merely states the offence prohibited. The learned SCJ drew the wrong inference that the absence of a contract of employment meant that the workers were exploited as the charges ie, used as forced labour.

[71] In fact, looking at the notes of evidence, there were oral agreements of sorts, although the terms are basic. For example, the four persons agreed to work for a salary of RM500 per month. The four persons were provided with an additional food allowance of RM100 per month. They were paid a commission of RM1 for each hour of actual work and could keep the tips paid to them by customers. The period of their contract was two years and they were to remain for the whole of the contract term (PW2's evidence at p. 86 of the record of appeal (vol. I)). They had to work seven days a week. They were provided with accommodation, etc.

[72] Finding (2) at p. 26 of the grounds of judgment. The learned SCJ said:

> Even if there is a contract, I similarly rule that these contracts had not prevented the accused from exploiting the four victims and thus they are void as well and have no effect. The salaries of the four victims have not been paid and were subjected to long duration of working hours.

[73] In respect of finding (2), it appears that the learned SCJ is here conceding that his previous finding (1) above is irrelevant. I also rule that the issue of whether the contract of employment was void or not is irrelevant to the charges. In so far as the fact that the four victims were not paid and were subject to long working hours, these abuses can be dealt with under different enactments, but they do not support the charge under s. 12 of the Act. I refer to my above findings on this issue.

[74] As to the finding that the four victims had to work long hours, it would appear that the learned SCJ failed to appreciate the admitted fact as shown from analysing exhs. P28 and P29 (the work sheets) that, although the workers had to work a 10 to 12 hours shift, the actual work done in the course of these shifts was on average about 35 hours per week.

[75] Finding (3) at pp. 26 and 27 of the grounds of judgment. The learned SCJ said:

> And there are obvious and clear exploitations committed by the accused against the four victims who were powerless to avoid such oppressions. Because there was no proper contract ... it was it open and easy for the accused to exploit them. The various exploitations happened when the accused had not paid the four persons their salary ... I am mindful that though the accused had explained in her defence that the salaries ... would be paid when the victims had completed their employment but this kind of arrangement was made without the consent of the victims. ... I rule that this non consent of the employees constitutes an exploitation as salaries are the right of any employees.

[76] I find that under finding (3), the so called "non consent" even if true cannot amount to an exploitation within the meaning of the Act and in the context of the charge of using the four persons as "forced labours". It begs the question of whether the four persons were forced into accepting the terms and into remaining in the employment of the accused within the meaning of the Act. By this finding, the learned SCJ had clearly misdirected himself. From the notes of evidence, PW1 never asked for her salary claiming she was afraid (p. 31 of the record), PW2 agreed for her salary to be retained until the end of the contract (p. 104) although she retraced it in re-examination (p. 112 of the record). PW3 did not ask for her salary because she said she was scared of being scolded (p. 129) and PW4 did reluctantly accept that it will be paid at the end of the contract (p. 169 of the record). None of the four person elected to stop working for the accused on these terms and were prevented from leaving.

[77] Finding (4) at p. 27 of the grounds of judgment. Learned SCJ said: A

> There is another form of exploitation committed here when the employees were not given any rest or off days and instead forced to work seven days per week as per evidence. In fact the accused herself did not rebut the fact that the four persons were forced to work seven days a week and were only given off days during Chinese New Year and Hari Raya. I rule that this constitutes grave exploitation and one of the worst of its kind. B

[78] Again with respect I say that the learned SCJ had misdirected himself in concluding that requiring the four persons to work seven days a week without off days amounted to exploitation. Crucially, there was no evidence C to conclude that the four persons were "forced" to work seven days a week within the meaning of the Act. The fact that the workers had the choice of either accepting onerous terms of employment or rejecting the employment militates against any suggestion that they were forced to work for the accused. There was definitely no evidence that any of the workers wanted D to leave but was prevented to do so by force or threat of force. Evidence in fact showed that the workers could always request their agent Madam Lau to find them alternative work if they wanted to.

[79] Finding (5) at p. 27 of the grounds of judgment. The learned SCJ said:

> The employees were also not given access to medical treatment when one of them had fallen sick as per evidence throughout the trial and this too constitutes exploitation. E

This finding of exploitation is not sustainable within the context of the charge against the accused. It does not address the ingredients of the offence under s. 12 of the Act. Furthermore, the learned SCJ drew the wrong inference F from admitted evidence that, "access to medical treatment" which I understand from the notes of evidence meant being sent to a clinic, was required when one of the alleged victims fell sick.

[80] PW1 testified that when she was sick she still had to work. Someone G bought medicine for her (at p. 28 of the record of appeal (vol. I)). PW2 testified that when she had a fever she still had to work and not brought to a clinic. She bought medicine for herself (at pp. 84 and 85 of the record of appeal (vol. I)). PW3 again testified that when she was sick she was not brought to the clinic. A friend bought medicine for her. There was no H evidence that the sickness suffered by the workers including a fever warranted sending them to a clinic. In fact, the learned SCJ seemed to have ignored an instance when the accused had sent PW4 who suffered from hypertension to a private clinic, although PW4 had to pay for her own medical bill (at pp. 166 and 188 of the record of appeal).

[81] Finding (6) at p. 28 of the grounds of judgment. The learned SCJ said: I

> The four victims were forced to stay in small cramped room which accommodated 15 people.

In coming to this conclusion, the learned SCJ had failed to take into consideration the accused's challenge to the allegation when it was put to the four prosecution's witnesses during cross examination that two rooms were provided but the workers choose to stay together in one. The accused herself testified (at p. 296 of the record of appeal (vol. II)) that other rooms were available to them. This evidence was not challenged by the prosecution during cross examination. In the light of this evidence, the learned SCJ ought to have stated his reasons why he disbelieved the accused on this point, but failed to do so. In any event, a finding of poor and cramped living condition is not of itself evidence of coercion or forced labour. Again, I recall the words of Amelia Tee Abdullah J in *Soo Ah Lai, supra* which I had quoted above.

[82] Finding (7) at p. 28 of the grounds of judgment. The learned SCJ said

> From clear evidence it is plain and obvious that the four victims were not allowed to call or contact their families home even though the accused claimed otherwise and had attempted to show phone bills to state to the contrary. But this bill was not put forth to the 4 victims at the prosecution's case.

Here, the learned SCJ came to the wrong conclusion on proven facts that **"evidence is plain and obvious"**. In accepting the evidence of PW1, the learned SCJ failed and refused to consider the contrary evidence of other prosecution's witnesses. For instance, PW2 categorically admitted that the accused had provided a handphone bearing telephone No. 013 8035000 for her and her colleagues to call home (at p. 111 of the record of appeal (vol. I)). This was further supported by PW3 who testified that she was allowed to contact her family back home (at p. 130 of the record of appeal (vol. I)). (emphasis added).

[83] The accused produced the phone bills for that particular handphone which showed the numerous calls were made to Indonesia and the names of the caller noted against the calls. These phone bills were admitted as exh. D1 (at pp. 506 to 516 of the record of appeal (vol. III)) without any objection from the prosecution. The accused's testimony that she had provided that telephone to her workers was not challenged by the prosecution in cross-examination. However, the learned SCJ took it upon himself to reject the accused's claim that the four witnesses could call home purely on the fact that the telephone bills were not put to the four witnesses when they were under cross-examination. I find that it was wrong for the learned SCJ to reject the evidence of the accused on this ground alone because, independent of the telephone bill, two prosecution's witnesses had testified that they were allowed to call home and one of the two witnesses had specifically identified the number of the phone used. The accused's evidence on the provision of telephone was also not challenged by the prosecution in cross-examination.

[84] As the phone bills were admitted as exh. D1 without objection from the prosecution, I can only assume that the authenticity of the phone bill is not in question. I find that there is great probative value in the phone bills generated by an independent source which the learned SCJ ought not to have rejected.

[85] The fact that the four persons could call home meant that they could call for rescue if they wanted. The proper inference to be drawn must be that the accused would not have provided the four persons and their colleagues with a mobile phone to call home if she had coerced them into forced labour.

[86] Finding (8) at p. 28 of the GOJ. The learned SCJ said:

> I am aware and mindful of the fact that the accused person did not bring in the four persons from Indonesia to Malaysia but the methods and ways of conveyance of a trafficked person is not an issue that can be used as a defence in a case under ATIPSOM. How and when and who bought the four Indonesians women in are not available defences to the accused.

[87] In coming to his finding at finding (8), even if this comment is correct, it does not infer that the accused is guilty under s. 12 of the Act. However I find that the learned SCJ's finding here missed the point. The charge framed against the accused did not specify whether she had trafficked in person by **acquiring** or (alternatively) **maintaining** the services the four persons through coercion nor any specific mode of trafficking. The prosecution went to great length to lead evidence to show how the four persons travelled from Indonesia to Miri. (emphasis added).

[88] The accused defence as shown in her submission was that she did not acquire or maintain the four persons through coercion and furthermore that she did not force them to work as forced labourers. Since the charges did not nominate whether her offence was by acquiring or maintaining the four persons, she was entitled to lead evidence to exclude at least the charge of **acquiring** through conveying or transferring the trafficked persons. The fact that she was not involved in bringing the four persons into Malaysia had cleared her from any allegation that she had **acquired them**. (Emphasis added).

[89] I think the learned SCJ's comment under finding (8) was made in the context of s. 17A of the Act, "… the prosecution need not prove the movement or conveyance of the trafficked person but the trafficked person was subject to exploitation".

[90] I find that even though the prosecution need not prove how a trafficked person is brought into the country, it is a different issue altogether in this appeal when the accused went on to prove that she was not involved in bringing the trafficked person into the country. In this way she had cleared herself at least of the charge of "acquiring" through transporting etc. This

defence ought to be considered by the learned SCJ. It is therefore a misdirection to rule that evidence showing that the accused was not involved in any way in the movement and conveyance of the trafficked person into Malaysia is irrelevant. I accordingly allow ground 9 of the petition of appeal.

[91] Next, the learned SCJ paid scant attention to the evidence of the accused, save to reject her evidence that the expenses for recruiting the four workers were absorbed by her and that her workers were provided a phone to call home. The evidence of the accused which had rebutted any allegation of acquiring or maintaining and in particular by "receiving" the four persons through coercion was totally ignored even though her evidence were never challenged in cross-examination. For example, the accused testified that the workers which she received from Madam Lau were trained during a probation period of one month. And that after the probation period, unsuitable recruits were returned to Madam Lau whilst the suitable ones had the option to carry on with her or to return to Madam Lau (at p. 286 of the record of appeal (vol. II)).

[92] This exculpatory evidence clearly showed that accused did not "receive" the four persons through coercion or used them as forced labour.

[93] With regards to living conditions and the meals provided at home, the accused testified that she provided the food and the workers cooked for themselves. The food provided included chicken, vegetable, fish and other food requested by the workers including mutton and beef. It also included fruits (at p. 293 of the record of appeal (vol. II)).

[94] In the light of the matters stated and the totality of all the evidence which are shown in the notes of evidence, I find that the learned SCJ erred in ruling that the accused had failed to create any reasonable doubt in the prosecution's case. In fact, I find that the prosecution had failed to discharge their burden of proving the charges against the accused beyond reasonable doubt. Consequently grounds 6, 8 and 18 of the petition of appeal are allowed.

[95] I now turn to ground 14 of the petition of appeal where the accused says that the learned SCJ ought to have invoked the presumption under s. 114(g) of the Evidence Act against the prosecution. With regard to the failure of the prosecution to call Madam Lau Hui Kin, I hold that since she was offered to the accused and the accused could have called her to testify, the failure of the prosecution to call her did not attract the presumption under s. 114(g) of the Evidence Act. However, with regards to calling the other co-workers who were found at the accused's place of business at the time of raid, their evidence would have been extremely useful on all the relevant issues, especially in the light of the contradictions between PW1 and the other witnesses in material respects. These co-workers were available at the time of trial. The investigating officer admitted that he had interviewed and recorded statements from all the 15 workers found at the accused's premises

during the raid (at p. 244 of the record of appeal (vol. II)). As their recorded statements were not extended to the defence, there was nothing to suggest that their evidence would be irrelevant. The prosecution had not explained why they choose to charge the accused with respect to only a selected number of workers, namely four of the 15 workers, all of whom had been interviewed by the investigating officer. The other co-workers were however sent back to Indonesia after many days into the trial without first calling them as witnesses nor were any of them offered to the accused (at pp. 176 and 177 of the record of appeal (vol. I)).

[96] At p. 25 of the GOJ, the learned SCJ declined to invoke the presumption under s. 114(g) of the Evidence Act against the prosecution. In so doing, he failed to address the failure of the prosecution to call the co-workers of the four persons or to offer them to the accused. Instead, he dealt with the reasons why the Indonesian agents and handlers located in Indonesia were not called (at p. 25 of the record of appeal (vol. I)).

[97] In the light of the above, I find that the learned SCJ had erred in failing to apply the presumption under s. 114(g) of the Evidence Act against the prosecution for their failure to call the other co-workers whilst they were available or at the very least making them available and offering them to the defence. This error amounted to a failure of justice. I therefore allow ground 14(b) of the petition of appeal.

[98] Since I had allowed the accused's appeal and acquitted her on numerous grounds, I do not need to deal with whether the custodial sentences imposed ought to be served concurrently or consecutively. I will ignore ground 19 of the petition of appeal.

[99] As regards to ground 20 of the petition of appeal, whilst I sympathise with the difficulty the defence may encounter where the charges failed to specify which of the various ways the accused was alleged to have trafficked in persons, I find there was no serious prejudice on this count. For this reason I reject ground 20 of the appeal.

[100] For reasons stated above I allow the accused appeal on conviction and as I such I acquit and discharge her of all charges. I also order the bail money and all fines already paid to be refunded to the accused.